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No. 172

In the Supreme Court of the United States

OCTOBER TERM, 1958

ERNEST KAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1-9; R. 3-12)[1] is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 17, 1958 (R. 13). On June 19, 1958, Mr. Chief Justice Warren extended the time for the filing of a petition for a writ of certiorari to and including July 15, 1958, and the petition was filed on that date.

[1] The record lodged with this Court consists of three volumes. Volume I contains *inter alia* the trial transcript, which is designated "T.". Volume II consists of the proceedings in the Court of Appeals and is termed "R.". Volume III contains the blood test sample.

QUESTIONS PRESENTED

1. Whether the Virginia "blood-test" statute, which spells out the steps to be followed in the giving of the blood test and in making the analysis, violates the Sixth Amendment in that it provides that, upon compliance with these statutory conditions, a certificate setting forth the results of the analysis duly attested by the Chief Medical Examiner of the state shall be admissible as evidence of the results of the test.

2. Whether the evidence sufficed to establish compliance with the statutory requirements as to the taking of the blood sample.

STATUTES INVOLVED

18 U.S.C. 13 provides:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Sections 18-75.1, 18-75.2, and 18-75.3 of the Code of Virginia, 1950, as amended, provide:

Section 18-75.1 * * * —

> In any criminal prosecution under § 18-75, or similar ordinance of any county, city or town, no person shall be required to submit to a determina-

tion of the amount of alcohol in his blood at the time of the alleged offense as shown by a chemical analysis of his blood, breath, or other bodily substance; however, any person arrested for a violation of § 18-75 or similar ordinance of any county, city or town shall be entitled to a determination of the amount of alcohol in his blood at the time of the alleged offense as shown by a chemical analysis of his blood or breath, provided the request for such determination is made within two hours of his arrest. Any such person shall, at the time of his arrest, be informed by the arresting authorities of his right to such determination, and if he makes such request, the arresting authorities shall render full assistance in obtaining such determination with reasonable promptness.

Only a physician, nurse or laboratory technician, shall withdraw blood for the purpose of determining the alcoholic content therein. The blood sample shall be placed in a sealed container provided by the Chief Medical Examiner. Upon completion of taking of the sample, the container must be resealed in the presence of the accused after calling the fact to his attention. The container shall be especially equipped with a sealing device, sealed so as not to allow tampering, labelled and identified showing the person making the test, the name of the accused, the date and time of taking. The sample shall be delivered to the police officer for transporting or mailing to the Chief Medical Examiner. Upon receipt of the blood sample, the office of the Chief Medical Examiner shall examine it for alcoholic content. That office

shall execute a certificate which certificate shall indicate the name of the accused, the date, time and by whom the same was received and examined, and a statement that the container seal had not been broken or otherwise tampered with and a statement of the alcoholic content of the sample. The certificate, attached to the container shall be returned to either the police officer making the arrest, the department from which it came, or to the clerk of the court in which the matter will be heard.

Upon the request of the person who was given a chemical test of blood or breath, the results of such test shall be made available to him.

An amount not to exceed five dollars to cover the costs of taking blood and making an analysis thereof shall be taxed as part of the costs of the case.

Other than as expressly provided herein, the provisions of this section shall not otherwise limit the introduction of any competent evidence bearing upon any question at issue before the court. The failure of the accused to request such a determination is not evidence and shall not be subject to comment in the trial of the case.

Section 18-75.2 * * * —

When any blood sample taken in accordance with the provisions of § 18-75.1 is forwarded for analysis to the Office of the Chief Medical Examiner, a report of the results of such analysis shall be made and filed in that office. Upon proper

identification of such vial, tube or container, the copy of such certificate as provided for in § 18-75.1 shall, when duly attested by the Chief Medical Examiner or any Assistant Chief Medical Examiner, be admissible in any court or proceeding as evidence of the facts therein stated and the results of the analysis of the blood of the accused.

Section 18-75.3 * * * —

In any prosecution for a violation of § 18-75, or any similar ordinance of any county, city or town, the amount of alcohol in the blood of the accused at the time of the alleged offense as indicated by a chemical analysis of the accused's blood or breath in accordance with the provisions of § 18-75.1, shall give rise to the following presumptions:

(1) If there was at that time 0.05 per cent or less by weight of alcohol in the accused's blood, it shall be presumed that the accused was not under the influence of alcoholic intoxicants;

(2) If there was at that time in excess of 0.05 per cent but less than 0.15 per cent by weight of alcohol in the accused's blood, such facts shall not give rise to any presumption that the accused was or was not under the influence of alcoholic intoxicants, but such facts may be considered with other competent evidence in determining the guilt or innocence of the accused;

(3) If there was at that time 0.15 per cent or more by weight of alcohol in the accused's blood, it shall be presumed that the accused was under the influence of alcoholic intoxicants.

STATEMENT

Following a jury trial held in the United States District Court for the Eastern District of Virginia, petitioner was convicted under each count of a two-count information charging (1) that he drove on a federal highway (U.S. 1) within the territorial limits of Virginia while under the influence of alcohol and (2) reckless driving (T. 1, 153-154). Petitioner was sentenced to 30 days' imprisonment on count 1 with execution suspended until final judgment by the Court of Appeals. Imposition of any sentence was suspended on count 2 for one year on condition that petitioner surrender his motor vehicle operator's license for one year to the clerk of the court (R. 27). The Court of Appeals unanimously affirmed (Pet. App. 1-9; R. 3-12).

The pertinent facts are as follows:

1. Shortly after 9 p.m. on the evening of December 6, 1956, petitioner, while driving his car on U.S. 1 just over the 14th Street Bridge within the territorial limits of Virginia, was involved in a collision with a tractor-trailer truck driven by one Adin A. Hamlin. The truck was carrying 5,000 gallons of fuel oil and was conspicuously placarded to that effect (T. 32, 53).

According to Hamlin, petitioner, who was driving in front of him, repeatedly tapped on his brakes forcing the truck to slow up and change gear (T. 53-54). Hamlin's attempts to pass were frustrated by petitioner who would change lanes and keep constantly in front of the truck (T. 54-55). On one of Hamlin's attempts to pass, petitioner suddenly applied his brakes and stopped short. Although Hamlin immediately put on his air brake, the truck slid about 8 feet and hit the

rear of petitioner's car (T. 54-55). Hamlin testified that a real danger of fire was caused by his sudden stop (T. 58). Immediately following the collision, petitioner got out of his car and approached the truck apparently ready to do Hamlin physical injury (T. 56-57). Although noticing no odor on petitioner's breath, Hamlin believed that petitioner was acting as if he were under the influence of alcohol (T. 57).[2]

Soon thereafter, officers Bragg and Kidwell of the United States Park Police arrived on the scene to investigate (T. 32-33, 47). They noticed "a strong odor of alcohol" emanating from petitioner's breath (T. 33, 48). Officer Bragg stated that petitioner seemed to be slightly unsteady on his feet and that his face was flushed (T. 33, 40). Officer Kidwell found him "loud and boisterous" (T. 48). Petitioner informed Officer Bragg that earlier that evening he had had about four beers and three or four drinks of whiskey (T. 34). In Bragg's opinion, petitioner was intoxicated (T. 36). Thereupon, he informed petitioner of his right to take a blood test, and petitioner indicated his willingness to do so (T. 34).[3] Accompanied by Officer Bragg, petitioner was taken to Alexandria Hospital, where a blood test was taken (T. 35). The result of this

[2] Petitioner's version of the collision was that heavy traffic was the cause for his having to occasionally apply his brakes, and that on one of these occasions he was struck by the truck traveling a foot or two behind him (T. 112-113). Initially, both petitioner and Hamlin were charged with responsibility for the collision. The case against Hamlin was dismissed on the motion of the United States Attorney (T. 36). Hamlin testified that he never spoke to the United States Attorney about the case, and was testifying under subpoena (T. 60-61).

[3] Officer Bragg denied that petitioner said he would take a blood test only if he had to (T. 43-44); for petitioner's version, see T. 114, 109-114.

test, as evidenced by a certificate attested to by the Chief Medical Examiner of Virginia, showed that petitioner's blood contained 0.15 per cent alcohol (T. 63-64), which, under Virginia law, creates the rebuttable presumption that he "was under the influence of alcoholic intoxicants" (*supra*, p. 5).

2. When, outside of the presence of the jury, the Government sought to introduce this certificate (T. 61-63), petitioner objected, contending that there was no proof that the certificate was signed by the Chief Medical Examiner, that the analysis was correct, or that the blood sample was properly taken (T. 63-67). Thereafter, with the jury excused, Officer Bragg was recalled and testified that he accompanied petitioner to the Emergency Room of Alexandria Hospital (T. 71-72), advised the nurse on duty that petitioner was there for a blood test, and requested that she call a physician (T. 72, 75). As he had in the past, the officer then obtained a blood sample container from a glass cabinet in the room (T. 72-73).

He further stated that the blood test vial comes in a sealed brown container (T. 74-75). Inside there are three sheets of paper: (1) an instruction sheet directing that the vial is to be unsealed and resealed in the accused's presence, and giving directions for mailing; (2) a label to be affixed to the vial itself; (3) a label to be affixed to the brown container after it is resealed, containing the Medical Examiner's address, and a place for the return address of the police officer (T. 77-78, 80).

Pursuant to the instruction sheet, Officer Bragg opened the package in the accused's presence (T. 74).

The physician [4] drew blood from petitioner's arm which was placed in the vial held by Officer Bragg. After recapping the vial, the officer shook it up with the powder therein to keep the blood from coagulating (T. 75). After putting the label on the vial, he placed it in the brown package, which he resealed in petitioner's presence (T. 75).[5] He then affixed the label containing the Medical Examiner's address and his own return address (T. 75). He then mailed it. When it came back, it was turned over to him unopened, bearing a Richmond postmark (T. 80-81).

The trial judge thereupon decided to admit the analysis into evidence, stating that he would charge the jury "that it is not a conclusive presumption either that the steps have been complied with or that there is intoxication" (T. 83). Officer Bragg then repeated the above testimony before the jury (T. 85-95), identifying the blood vial and the labels accompanying the blood alcohol report as those he had mailed out (T. 91-95).

3. "Dr. Chao or Ochao" had been written on the label by Officer Bragg as the name of the physician who had administered the test.[6] Helena F. Beattie, Head Nurse, Emergency Room, Alexandria Hospital, testified that there was a Dr. Chao on the staff who was there in

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[4] The officer did not personally know whether it was a doctor who administered the test; but testified that the "man" was dressed in a white uniform (T. 75, 93). When the officer repeated his testimony before the jury, he stated he had seen the "man" before in the hospital treating patients and giving blood tests (T. 94).

[5] He put the physician's name on the label—"Dr. Chao or Ochao"— (T. 76), and, as he later testified before the jury, the date, the time the test was taken, and his signature (T. 88-89). The vial cannot be opened except by tearing the label (T. 77).

[6] See note 5, *supra*.

December 1956. She further stated that Dr. Chao is a woman (T. 108-109). Petitioner testified that a "lady . . . with a white coat" administered the test (T. 115). Officer Bragg had stated that the physician was male (T. 96). The judge ruled that the discrepancy as to the sex of the physician "would go to the weight" to be given the test and "could or could not be a mistake". He found that such discrepancy did not warrant the exclusion of the blood test evidence (T. 109).

ARGUMENT

Petitioner recognizes (Pet. 4-5) that the Assimilative Crimes Act, 18 U.S.C. 13 (*supra*, p. 2), makes applicable to this case the Virginia "blood-test" law (Section 18-75.1, 75.2, 75.3, Code of Virginia, 1950, as amended, *supra*, pp. 2-3), as the court below held (Pet. App. 3-4). See *United States* v. *Sharpnack*, 355 U. S. 286. He argues, however: (1) that the requirements of the Virginia statute were not met in this case, and more broadly (2) that the Virginia statute violates the Sixth Amendment.

1. His challenge to the validity of the statute is that the rebuttable presumption of intoxication which arises if 0.15 per cent or more, by weight, of alcohol is found in the accused's blood, is not derived from direct testimony as to the correctness of the analysis which petitioner concedes would warrant such a presumption but is derived from a report of such analysis attested to by the Chief Medical Examiner of the State. This, he avers, is permitting the presumption to arise "upon an unproven fact" and thus to carve out an unwarranted exception to the hearsay rule (Pet. 10-14).

To insure the veracity of the blood test report, the statute particularizes every step to be followed from

the initial taking of the blood sample to the final analysis. The report is admissible only if the test is administered in accordance with the detailed statutory requirements of Section 18-75.1 (*supra*, pp. 2-4), specifying the persons who may administer the test (physician, nurse, or laboratory technician) and requiring that the vial containing the blood be sealed, properly identified, and mailed to the Chief Medical Examiner. The section further requires that the Examiner have the blood examined for alcoholic content and thereafter execute a certificate containing the report, the name of the accused, the person who examined the sample, and a statement that it was not tampered with. He is then to return it to the officer making the arrest, the department from which it came, or the clerk of the court where the matter is to be heard. Only if these steps are followed may the certificate be admitted to evidence the result of the test.[7]

The Virginia legislature, by this statute, has provided for a specific application to these tests of the well-established exceptions to the hearsay rule permitting the admission in evidence of official records and of records kept in the ordinary course of business. See 5 Wigmore, *Evidence* (3d ed. 1940), §§ 1517, 1522-1528; cf. 28 U.S.C. 1732, embodying the federal business-records rule. As the court below held, the Sixth Amendment does not prevent Congress or a state legislature from carving out a new exception to the hearsay rule "where there is reasonable necessity for it and where it is supported by an adequate basis for assurance that the evidence has those qualities of reliability and trust-

[7] In this case, Officer Bragg testified fully to the taking of the test, and identified the report which was signed by the Medical Examiner as required by the statute (see the Statement, *supra*, pp. 8-9).

worthiness attributed to other evidence admissible under long established exceptions to the hearsay rule" (Pet. App. 7). Cf. *Tot* v. *United States*, 319 U.S. 463, 467.

Comparable certificates with like safeguards to insure their correctness have been upheld over similar constitutional objection. See, *e.g.*, *State* v. *Torello*, 103 Conn. 511; *Commonwealth* v. *Slavski*, 245 Mass. 405; *Commonwealth* v. *Stoler*, 259 Mass. 109; *Bracy* v. *Commonwealth*, 119 Va. 867.

The error in petitioner's argument is that he confuses the question of admissibility of the report with that of its evidentiary weight. Undoubtedly, as the court below pointed out (Pet. App. 6), the report was subject to attack by credible evidence pointing to a real defect in the test or the analysis. Cf. *Bodnar* v. *United States*, 248 F. 2d 481 (C.A. 6). The fact is, however, that petitioner submitted no evidence casting doubt on the verity of the report or to overcome the rational presumption of intoxication that it created.

2. Beyond this, petitioner's contentions turn on the particular facts of this case. He asserts that the prescribed statutory steps were not here complied with in that he allegedly did not request the blood test and that there was insufficient evidence as to the identity of the person giving the test and as to whether the test was properly given. In short, he contends that the taking of the test amounted to an unlawful search and seizure and that the introduction into evidence of the blood analysis report violated due process requirements (Pet. 8-10).

These contentions all relate to factual matters either resolved adversely to petitioner on ample evidence or uncontested by petitioner in the trial court. There is,

therefore no occasion for review by this Court. See *Glasser* v. *United States*, 315 U.S. 60, 80. For example, on the issue of whether petitioner requested the blood test, Officer Bragg testified that, in accordance with the statute, he advised petitioner of his right to take the test and petitioner said he was willing to do so (T. 34). Although petitioner testified that he informed the officer he would take the test only if he had to (T. 114), this issue was not made part of his challenge, at the trial, to the admissibility of the analysis (T. 63-67), and, in any event, the judge properly charged the jury that under the statute the test was optional and that an accused could not be forced to submit to it (T. 145). Again, despite the fact there was a difference in the testimony as to the sex of the person administering the test, there was sufficient evidence to warrant a finding that such person was a physician on the staff of Alexandria Hospital (see the Statement, *supra*, pp. 9-10).

With respect to the possibility of contamination, and other questions relating to the regularity of taking the blood sample and making the analysis, petitioner submitted no evidence that the statutory requirements were disregarded. As the court below pointed out (Pet. App. 6): "Such questions, however, go to the weight of the evidence rather than to the initial admissibility of the certificate. If the proof established a material failure to follow the procedure required by § 18-75.1, it may be that the certificate should be stricken from the record, but the proof here established no such failure."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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